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JOSEPH F. SPANIOL, JR.
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# In the Supreme Court of the United States

OCTOBER TERM 1987

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BADDOUR, INC.,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

VOLUME III

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I am convinced that Respondent discharged Pat Amsden because of his activities on behalf of the Union. Amsden's denial of sleeping on the job was corroborated by Virgil Melton who testified in a clear, concise and detailed manner. He stated that Amsden was not asleep and that he told his immediate supervisor Ron Gatlin, who testified that Melton told him that Amsden was not asleep at the time Bond states he saw him sleeping. Although supervisor Camp and Smith had knowledge of Melton's statement prior to the discharge, neither made an attempt to contact Melton to shed light on the conflicting versions of what happened that night. In addition to it being very unlikely that an employee would be asleep in a visible area of the warehouse after

being warned that he was being set up and aware that he was being watched because of his union activity, would be asleep, and at such a short time after lunch break, which ended at 4:05 a.m.

In all the circumstances, including the timing of the discharge, the Union animus displayed by Respondent and the credible evidence of record, I find that Respondent's reasons for the discharge of Pat Amsden were pretextual and that he was discharged because of his union activity, in violation of Section 8(a)(3) and (1) of the Act.

Warning and Transfer of Employee Williams

Employee Jerry Leonard Williams was employed as a cart control person. His immediate supervisor was Greg Taylor.

His duties as cart control person were to monitor the operations of the tow rail and balance cart availability. He also checked for proper usage of those facilities and reported any mechanical problems. Williams' job duties required him at times to ride a bicycle. In performing his job Williams had access to the entire warehouse.

On September 22, Williams was subpoenaed by the Union to appear before the Board at a representation hearing and on that date, he gave the subpoena to his supervisor, Greg Taylor. After the hearing on September 22, Taylor approached Williams and showed him the Teamster by-laws and constitution and stated that Williams could be fined and assessed by the Union. He also told

Williams that if the Union goes on strike in New York, that he could have money assessed out of his check. Williams told Taylor that he wasn't interested and that he wanted union representation.

On October 13, Williams was taken out of the cart control position and placed in the consolidator department and given the position of consolidator. His duties as consolidator were to lift mail totes off the conveyor belt and place them in empty carts to send to shipping. A consolidator must lift the mail totes that weigh up to 150 pounds by hand. After the transfer, Greg Taylor continued to be Williams supervisor.

A few days before his transfer to consolidator, Williams was riding his

bicycle in shipping when employee Michael Stokes told Williams that his (Stokes) supervisor, Mike Smith, was asking him what went on at the union meeting the night before. Upon hearing that, Williams went to his supervisor, Greg Taylor, and told him that if supervisor Mike Smith asks another question about the Union that Williams would file charges against him through the Teamsters union. Taylor told Williams that he would relay the message to supervisor Smith.

After the transfer, Williams was told by supervisor Taylor to stay in unit 1. Williams was not allowed to go around the plant or go back to his position as cart control person. Williams remained at the consolidator position until he hurt his

back lifting a mail tote on November 9. At the time of Williams' transfer to consolidator there were two full-time consolidators, Steve Dodds and William Davis. Since Williams' transfer, Dodds has worked the consolidator position only part-time.

Eason Camp, manager of picking and stocking, testified that he made the decision to transfer Williams from the position of cart controller to consolidator on the morning of October 13, the day Williams was transferred. He testified that the transfer was made because of an increase in demand of, "the work at the consolidator job". Camp testified that he did not supervise the cart control area nor did he directly supervise the consolidator area.

However, he said that his responsibilities were to coordinate the whole picking and stocking area. He said that he does not generally transfer people into the consolidator position and he could not recall any hourly employee besides Williams that he had moved from another area to the consolidator area.

A few days after Williams was transferred to the consolidator position, he hurt his hand and was unable to do consolidator work so he was given the duties of housekeeper in the consolidator area. When asked why he didn't place Williams back in cart control, Camp testified that it did not enter his mind but that he did make the decision to keep Williams in the consolidator area as a housekeeper.

Camp admitted that as consolidator, Williams was limited to one specific area of the warehouse and that although it usually takes a week to train an employee in consolidator position, Camp stated that to his knowledge Williams had not worked the position of consolidator prior to his transfer. He said he knew of other employees who had worked the position of consolidator prior to Williams' transfer, but he chose not to place them back into the consolidator position. Camp said he knew employee John Anderson had been working in the consolidator position prior to Williams' transfer but he did not know exactly what Anderson was doing that week without checking the record. He said he was either filling orders or stocking. Camp

said he did not choose to take Anderson and put him back into the consolidator position but did not explain why.

Although Respondent offered a list of floaters used in unit 1 during the period before Williams' transfer, the document was apparently introduced to show the increase work load in unit 1. However, the document also shows a decrease in the use of floaters in unit 1 after Williams' transfer. Camp testified that the purpose of having floaters as well as temporary employees available was to use them interchangeably. However, not one floater or temporary employee worked the position of consolidator during the period of Williams' transfer. Temporary employees were used in the consolidator position prior to Williams' transfer.

When asked why a temporary employee or floater was not used for the consolidator position instead of transferring Williams, Camp responded, "They don't know how to do anything, any job that we have, they have to be trained . . . . we do not realize an immediate benefit from a temporary employee".

The Handbilling Incident

On October 14, Williams requested a vacation day off and was granted it by his supervisor, Greg Taylor. At 3:45 p.m. on his day off, Williams handbilled on behalf of the Union outside the gate. As Williams was handbilling, Taylor, with his wife at his side, approached Williams and told him he could not handbill. Williams responded that he had taken a vacation day and that he could do

anything he wished. Taylor then told Williams that he could not distribute handbills on behalf of the Union and that he would have to leave. Again, Williams reminded Taylor it was his vacation day. Taylor insisted on Williams leaving. Williams then called 'Shorty', another handbiller, to assist him. Taylor then left as Shorty was walking towards him.[16]

Taylor admits that he had a conversation with Williams at the gate while Williams was handbilling but said that Williams approached his truck and initiated the conversation. Taylor

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16/ Williams' testimony was corroborated by employee Jeffrey Pope who was also handbilling at the time of the incident. Pope testified that he saw Taylor talking to Williams while Williams was handbilling and that when Williams called Shorty over, Taylor left.

denied mentioning handbilling during the conversation. He said he asked Williams if he brought a doctor's excuse because Williams had led him to believe that he had been sick. Taylor also denied that Williams called Shorty over to where they were talking. Taylor admitted, however, that he backed up his truck and went back to Respondent to report the incident. He said he wanted to report the incident because he was apprehensive of bodily harm being inflicted upon him because Williams indicated that he was going to get Shorty. Taylor said that because his wife was in the truck he felt like he needed to report the incident. Notwithstanding, Taylor's alleged concern for bodily injury to him or his wife, a few minutes later, Taylor permitted his

wife to drive through the gate alone while he remained in the plant.

Taylor denies any knowledge of Williams' union activity prior to Williams' handbilling on October 14. He also denied that Williams gave him a subpoena in September so that he could be out of work to attend the NLRB hearing. Williams testified that he gave the subpoena to Taylor on the morning of September 22.[17]

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17/ Because of the corroboration of Williams' version of what took place during the handbilling incident and because of Williams' calmed, controlled, and confident demeanor while testifying and inasmuch as his testimony was given without hesitation and without even a hint of evasiveness, I credit Williams and not Taylor who testified in a guarded and hesitant manner with several memory lapses.

## Williams' 90-days' Probation for Unexcused Absence

On November 8 at about 7:30 a.m., Williams called the plant and told supervisor Taylor he had car trouble and that he would try to get to work as soon as he could. At about 9:30 a.m., Williams called Taylor and informed him that the timing chain on his car was malfunctioning and that he would be there as soon as he could. At 2:30 p.m., Williams again called the plant but Taylor was unavailable. Williams spoke to Rick Wakefield, the department head. Williams told Wakefield that he was unable to get his car fixed and he could not report to work because he had no means of transportation. Williams also told Wakefield that he would be in on the next day and bring a receipt for the car

repairs. On the following day, supervisor Taylor accompanied Williams to his office where Wayne Street, a supervisor, was waiting. Williams was then placed on 90-days probation for an unexcused absence.

In February, prior to the October incident discussed above, Williams was given a personal absence (excused) after calling supervisor Taylor that he had car trouble and would try to be in as soon as the car was repaired. Williams could not make it to work that day either. However, he did not get a warning but rather a personal absence or an excused absence. In that connection, employees Jerry Britton and Virgil Melton testified concerning days that they missed work because of car trouble and neither was

given a warning. Each absence was treated as an excused absence.

Supervisor Taylor testified that Williams received discipline because the absence was his fourth and only the first occurrence of car trouble permits an excused absence. However, contrary to supervisor Taylor's testimony, Williams personnel file reveals that he had been given several excused absences for car trouble.

Rick Wakefield, department head, testified that whenever he had a problem, he would call in the same morning and request a vacation day and the request was granted.

## Williams is Cut Off from Workmen's Compensation Pay

Williams was injured on the job on November 9, and on November 24, began receiving workmen's compensation pay from Liberty Mutual Insurance Company. Since that date he had been receiving a check every two weeks.

On February 22, during his testimony in the instant proceeding, Williams was questioned concerning the use of the name "Lowell" Williams which was not his first name. Williams said that his brother Lowell filled out the employment application and submitted it to Respondent but when the job became available his brother had already found another job so Jerry Williams went in for the job interview. Jerry Williams was

hired in his brother's place on the strength of his brother's job application. He was hired as "Lowell", using his brother's name and Social Security number, on October 6, 1980.

In February 1981, Williams told supervisor Eason Camp that his brother Lowell had filled out the application, but that he, "Jerry", was interviewed and hired and that he was then using his brother Lowell's name and Social Security number. Upon receiving the true story, instead of straightening out the records at that time, Williams' Social Security number was changed from his brother's number to his (Jerry's) number. But the name "Lowell" remained in his personnel file unchanged and Jerry continued to be known as "Lowell" Williams without

objection from Respondent. Eason Camp corroborated Williams' testimony that Jerry Williams did tell him, in February 1981, that his brother Lowell had filled out the application and that he, Jerry. was interviewed for the job. Williams' personnel file reflects the change in Social Security numbers, as of February 1981.

On March 2, 1982, Williams called Liberty Mutual Insurance Company because he did not get his Workmen's Compensation check. He was told that a representative of Respondent had called and said that he had used fraud on the company. Williams then called Fred Stearns, the personnel manager of Respondent, and Stearns told Williams that he had used fraud against the company. Daniel Jenkins, claims

manager of Liberty Mutual, testified that on February 25, 1983, his office was contacted by Respondent regarding a possible discrepancy in signature on a claim that had been reported to them as the individual named Lowell Williams, as a result, Williams' benefits were cut off.

Fred Stearns testified he did talk to Dan Jenkins of Liberty Mutual and told him that he had found out that the person who was drawing the workmen's compensation under the name "Lowell" Williams was actually another person. He gave him the name but he denied telling Jenkins to cut off Williams benefits. He said that he waited to inform Liberty Mutual after Williams testified because, before the hearing, he did not know that

Lowell Williams was actually Jerry Williams. He also denied he had a desire or plan to retaliate against Mr. Williams for testifying at the hearing. Stearns testified, however, that he was aware of the fact that the Social Security number had been changed from that of Lowell Williams to Jerry Williams. Stearns also denied telling Williams that when he called Liberty Mutual he told them that he had used fraud against the company.

I credit Williams who, although when sworn, testified as Lowell Williams rather than Jerry Williams, reported the true facts to Respondent on his own in February 1981, less than 4 months after he was hired (Williams is still an employee of Respondent). Respondent is responsible in view of the February 1981

disclosure by Jerry Williams for Williams remaining on the job and being identified as "Lowell" Williams instead of Jerry Williams and given paychecks naming "Lowell" Williams. Even though Respondent was notified it did not change Williams' personnel records or recognize or pay him under his proper name. Respondent condoned Williams' use of the name "Lowell" Williams. Therefore, I do not hold Jerry Williams responsible for continuing under the name "Lowell" rather than his own name while at work.

I find also that Respondent is responsible for the insurance carrier processing the workman's compensation claim for "Lowell" Williams and making the checks out to "Lowell" Williams. I do not consider Jerry Williams as having

created any fraud against Liberty Mutual or Respondent. Williams received compensation checks that he was entitled to, albeit under the name "Lowell". In the circumstances, Respondent did not act in good faith towards its employee Jerry Williams by causing a cessation of his workmen's compensation pay. I find that Respondent's act was malicious and in retaliation for Williams' appearing and testifying on behalf of the General Counsel in this matter. I credit Williams' version and not Stearns' version of the facts.

As previously stated, I credit Williams and not Taylor with respect to the alleged interrogation of Williams' union activity in violation of Section 8(a)(1) of the Act. I find that Taylor

was aware of Williams' union activity prior to October 14. Williams was subpoenaed by the Union to testify at the Board hearing on September 22, and Williams handed the subpoena to his supervisor, Taylor, in order to be excused to attend the hearing.

I also find that Williams was discriminatorily transferred to a more onerous job because of his union activity and in order to isolate him in a job requiring him to remain in one area of the warehouse. Camp's testimony was rife with inconsistencies and lacking in plausible explanations for transferring Williams rather transferring other employees who either had been trained for the consolidator job or temporary employees or floaters who were

specifically employed for such emergencies. Camp was evasive and nervous while testifying. Moreover, it is significant that no other employee was placed in the consolidator position on a steady basis to replace him after Williams left when he hurt his back.

The timing of the transfer, October 13, two weeks prior to the election, reveals that Respondent sought to take a known union adherent out of the main stream of the warehouse and place him in a more onerous job restricting him to a specific location, in violation of Section 8(a)(3) and (1) of the Act.

Based on the testimony of employees Williams, Melton and Britton, all previously discussed herein, Respondent's

policy was to give an excused absence if an employee missed work because of car trouble. Indeed, Respondent's own witness, Rick Wakefield, testified that on occasion he would call in on the same morning and request a day off and would be allowed either a day without pay or a vacation day without any adverse consequences. The conclusion is unavoidable, and I so conclude, that Respondent gave Williams a warning and placed him on probation because of his union activity, in violation of Section 8(a)(3) and (1) of the Act.

I also find that Taylor's conduct at the gate while Williams was handbilling was a violation of Section 8(a)(1) of the Act. Respondent's conduct against Williams for giving testimony in a Board

proceeding is a violation of Section 8(a)(1), (3) and (4) of the Act. Pickle Bill's Inc., 224 NLRB 413 (1976); Richland Textiles, Inc., 220 NLRB 615 (1975).

The Transfer of Employee Elton Hill

The complaint alleges that on or about October 29, 1982, Respondent, at its Memphis, Tennessee, facility, transferred its employee, Elton Hill, to a less desirable position of employment and assigned to him more onerous work task because he joined, supported, or assisted the Union and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, in violation of Section 8(a)(1) and (3) of the Act.

Elton Hill has been employed by the Respondent for over two and a half years as a forklift driver. He was involved in the union campaign, attended union meetings, wore union buttons and had a union bumper sticker on his car. He started wearing union buttons about a week before the election. His job before the election was forklift driver in unit 1. His supervisor was Bobby McCullough. The election was held on October 29, in unit 1, just 50 feet from where Hill was working. Hill wore 10 union buttons on the day of the election. On that day, supervisor McCullough approached Hill and told him that he was being transferred to unit 3 to work on a rush trailer at door 68. When he got to door 68, Bo Berry, acting supervisor, told him to go to door 77, as there was no rush trailer at door

68. Hill remained in unit 3 the rest of the day. Employee Steve Presley who at the time was wearing a "Vote No" button, was sent to unit 1 to work in Hill's place.

On Monday, November 1, Hill reported back to unit 1. Bobby McCullough sent him to unit 3, stating that he was needed back there for another week. Hill reported to Jim Stacks, supervisor in unit 3. Stacks was passing out the forklift sheets to the lift drivers. Everyone received a forklift sheet except Hill. Hill was given a productivity sheet and was required to unload the drop trailers by hand. Steve Lenti, the material handler in unit 3, was given a forklift to drive. After November 1, Hill remained in unit 3 and was given the

job of unloading trailers by hand. He was not given a forklift unless a lift driver was absent or on vacation. About a week after the election Hill asked Bo Berry, acting supervisor, what his job position was. Hill testified that Berry told him that it was "job flunky, material handler, whatever I wanted it to be".

When Hill was transferred on October 29, he was harassed by his supervisors. They stood around and watched him. He was told that he could no longer punch in at 7 a.m., but had to punch in at 6:55 to 7 a.m. Hill's testimony was corroborated by employee David Durrough. Durrough also worked in unit 1 prior to the election. The day of the election he had worn 5 Union buttons, and, as in the case

of Elton Hill, the polling area was just 50 feet from Durrough's working area. Durrough testified that his supervisor, McCullough, had instructed him to go to the rush trailer in unit 3 and when they got to unit 3 there was no rush trailer. Employee Greg Gray was transferred from unit 3 to work in Durrough's place in unit 1. While in unit 3, Durrough retained his job title and duties as receiving clerk. On December 15, Durrough was transferred back to unit 1.

Supervisor of unit 1, Bobby McCullough, testified that he was not involved in the decision to transfer Elton Hill. He said he did not know who made the transfer. Similarly, Don Davis, assistant receiving manager. testified that he was not involved in the decision

to transfer Elton Hill and he did not know the reasons for his transfer.

Respondent introduced exhibits which showed the percentage of time that Hill worked as a material handler prior to his transfer on October 29, 1982. However, Hill stated that when he was in unit 1, that unit had no individual materials handler, so the forklift drivers in that unit at times had to get off their lifts and help the truck drivers separate goods. The driver would then stack the goods on pallets for the lift drivers to pull. However, while in unit 3, Hill worked only as a materials handIer, unless someone was absent. And as a materials handler in unit 3 Hill had to separate the material on the truck, drag a pallet into the truck, and then stack

the material on the pallet. He did that exclusively all day.

It is clear from the evidence that Elton Hill, a known union adherent, was transferred to a more onerous position as a materials handler during the period of October 29 through December 17. His proximity to the polling place on election day and his wearing of a union button apparently was too much for Respondent. The result, they transferred him out of there in a hurry. The fact that Hill's immediate supervisor was not able to explain the reason for the transfer, and no explanation was offered by Respondent for the transfer, adds substance to the allegation in the complaint. Moreover, Hill's testimony was not rebutted by Respondent.

Accordingly, I find that the transfer of Hill to a more onerous position during the period of October 29 through December 27 is a violation of Section 8(a)(3) and (1) of the Act. Serv U-Stores, Inc., 225 NLRB 37 (1976); Jack LaLanne Management Corp., 218 NLRB 900 (1975).

The Alleged Surveillance by Respondent's Security Guards

Employee Dennis Gray testified that in late August he noticed the union handbilling outside the gate at the plant entrance. He said there was a guard parked in the front of the gate inside the plant entrance who appeared to be writing down license plate numbers of people accepting union literature then being distributed. The guard would look up and down as the cars went by. Gray

said that the guard was present at the gate on about two occasions while the union was handbilling. He testified further that he had not seen any guards at the gate before or since the union campaign. Employee Kyle Wade Love testified that in late August he noticed a guard while he was driving through the gate on his way home. He said the guard's car was parked facing the gate and on that occasion he observed the guard sitting and watching for about 5 minutes.

Employee Jeffrey Ruffin testified that on some occasions when the union was handbilling at the gate, he noticed the guards watching the handbillers. He said the guards were parked outside the gate, facing the handbillers about 30 feet from

the gate. He noticed the guards at that location about three or four times. He said that prior to the organization campaign, the guards were seen only riding around in the parking lot or inside the building.

Employee Jerry Britton stated that on at least two occasions he saw a guard parked near the gate while the union was handbilling. He said the guard was parked just inside the gate facing the gate. The guard was looking straight towards the gate where the union was handbilling.

Employee Anita Neal testified that the day after she received her Teamster bumper sticker in late September or early October, as she was driving through the

gate one morning to work she noticed two guards in one car sitting at the gate watching the cars as they came in. She said she backed her car into her parking place and stayed in her car for a few minutes. While sitting there, she noticed that the guards who had been sitting at the gate drove down the aisle she was in, they passed her car and stopped about two cars away from her. She said they stopped and the guard on the passenger side wrote something. She said that after the guards drove off she noticed the parked car that was adjacent to the guards' car had a "Teamsters" bumper sticker on it. The guards drove down past three or four more cars and stopped again, but this time she did not see if the guards wrote anything down, but when they drove off she walked up the

aisle and looked at the car they stopped near and noticed that car also had a "Teamsters" sticker on it. The cars next to the two cars with the "Teamsters" stickers had no "Teamsters" stickers. Neal also stated that, in the past, she observed one guard per car in the parking lot but never two in one car. On the occasions described above, the guards did not get out of the car to place notes on the cars as they did when checking for Baddour parking stickers.

Employee Danny Fitch testified that one morning at about 6:30 a.m. in mid-September he noticed two guards in a car parked at the gate facing the gate. Fitch said a union bumper sticker was on his car and, as he drove through, he noticed the guard writing something down.

Fitch then parked about 30 yards away, where he could see what the guards were doing and noticed the guards wrote something down when cars with union bumper stickers came through the gate. Fitch said the guards did not write anything when cars with no union bumper stickers came through. Fitch said that every time the guard would nod his head as if he were writing, Fitch could notice a union bumper sticker on the rear end of the passing car. He said he watched this activity for about 15 minutes. He had not seen the guards at this location prior or after that time.

Employees Leonora Richardson and Charles McDonald testified on behalf of Respondent. They belonged to a committee called BEAUR (Baddour Employees Against

Union Representation). Richardson testified that the committee had handbilled at the gate alongside the Union handbillers. She said that the first two or three times of Union handbilling she was not at the gate. She further testified that there was no occasion when the Union handbilled that she was not either handbilling at the gate or passing through the gate. She said that she noticed the guards parked at the gate on one occasion a week before the election. She said that on that occasion there were two men from Schlitz talking to another employee and there was talk of a gun. During that incident the guards remained at the gate for 4 minutes.

McDonald testified that the first few times the Union handbilled he was not out at the gate handbilling. He said that there was no occasion during which he handbilled or passed through the gate that he noticed the guards parked at the gate. McDonald also said that the members of the committee paid for the material and leaflets that they gave out at the gate. Richardson, however, denied she paid for the literature that was handed out by BEAUR. Both McDonald and Richardson testified that they were pretty busy at the time they were handbilling at the gate.

Tryce Barber, manager of assets protection, testified on behalf of Respondent. He said that the security people had standing orders that if there

was any unusual activity "on our perimeter to dispatch a guard to see what's happening and report back". He said that when the first handbilling activity occurred a guard investigated the handbilling activity. When asked how he knew that, Barber said he heard the guard talking on the radio. When asked how the guard investigated, Barber testified that "he went in a car. We have a patrolman, I guess you'd call it. He was making his rounds and radioed in. He said that there was activity at the gate. I heard him and I went back around there to see what was going on". Barber asked the guard what he saw. The guard's response was, "Just some people assembled at our gate". The guard asked what should he do, "and I just told him to back off and observe and make sure that

he didn't have any instances, you know, fist fights or whatever; make sure the safety of the people was insured; not block the gate, you know, just as long as it was out of the way where people could get in and out of the property. He didn't have any trouble. He radioed back and said everything was going fine". Barber said the guard did not report anything to him after the handbilling activity occurred nor did they report the names of employees who took handbills or who participated in the handbilling activity. Barber also stated that he told the guards to stay and observe other instances of handbilling.

It is clear from a preponderance of the evidence that the guards were engaged in surveillance of the employee's union

activities and I find that such conduct to be in violation of Section 8(a)(1) of the Act. J. P. Stevens and Company, 244 NLRB 407 (1979); Baptist Memorial Hospital, 229 NLRB 45 (1977); Shrewsbury Nursing Home, Inc., 227 NLRB 47 (1976).

The No-Solicitation Rule

In February 1981, the Respondent prepared an employee handbook for distribution to all personnel. On page 24 of that handbook appears the following provision:

> "To avoid interruption of work and complications and distractions in our operations, employees are not permitted to sell anything, distribute or post literature or other matter, make speeches or collections, or engage in any kind of solicitation during their working time, or in any way to interfere with the work of other employees."

The General Counsel alleges that that rule is a violation of the Act. In addition the promulgation and maintenance of the rule are alleged to be violative conduct interfering with the employees free choice in connection with the October 29, 1982, election.

Respondent argues that in response to the change in Board law concerning rules such as that quoted above (TRW Bearing Division, a DIV of TRW, Inc., 257 NLRB 442 (1981)), the Respondent reviewed its no-solicitation/no-distribution rule and determined that a clarification of the rule was necessary to comply with new Board law. Respondent contends that the clarification was made in the form of a Notice to Employees, dated November 2,

1981, and posted on every bulletin board in Respondent's entire facility. That Notice reads as follows:

NOTICE TO EMPLOYEES

> "In our employee handbook, there is a rule which outlines when and where you cannot solicit your fellow employees, to insure there is no misunderstanding about this, employees are not permitted to solicit for any cause during the time they are supposed to be working or in any way which would interfere with the work of others. These types of activities are only permitted during non-work periods such as lunch, rest periods, and before and after work".

Respondent contends that the Notice was posted throughout the facility and has remained continuously posted since the first week of November 1981. Respondent also contends that the bulletin board form of communication was selected

because it insured that the change in the rule would immediately be brought to the attention of all employees.

Respondent further contends that as the employee handbook had been prepared only 6 months before the announcement of the Board's decision in TRW, supra, the Respondent's management felt that it was unnecessarily costly and inefficient to order the republication of the entire handbook. Respondent contends further that a Notice to Employees bearing the same clarification language is now inserted in all employee handbooks.

Unfortunately that Notice to Employees bearing the same clarification language was not either given to all employees to insert in their own

handbooks nor inserted in all employee handbooks prior to the organizational activity which took place prior to the October 29, 1982, election. It is a well established legal principle that an amendment or a change in a rule should be made by the same medium as the publication and distribution of the rule. There would have been no doubt whatsoever concerning the clarification of the rule and notice to the employees if the employees had been provided with the written clarification personally as they were provided the employee handbooks and manuals and, indeed, anti-union literature during the organization campaign. This should have been done at the time the rules were posted on all employee bulletin boards in the plant. It would not have been necessary for the

employer to republish the entire handbook. All that was necessary to be done was for the employer, at the time it posted the change on the bulletin board, to give each employee a copy of the change and to tell that employee to insert it in his personal copy of the handbook. There is no evidence that Respondent did that.

Supervisor Don Davis testified that that was the only rule and there were no attachments or amendments to the rule as it is shown in the employee handbook. Employees Pat Amsden and David Durrough also testified that there were no attachments or changes to the solicitation rule as it is written in the employee handbook.

Respondent's witness Don Eure, Personnel Manager, who testified that since November 1981, clarification of the solicitation rule has been posted on Respondent's bulletin board. However, contrary to Eure's testimony, Larry Mayes denied ever seeing the clarification of the solicitation rule on Respondent's bulletin board.

Respondent's employee Jerry Williams stated that although he read the bulletin board often, he has never seen a clarification of the solicitation rule prior to the hearing and has never seen it on Respondent's bulletin board. Respondent's witness Don Eure testified that he prepared the clarification of the solicitation rule in November 1981. He also testified that he was also involved

in the preparation of the personnel manual which was distributed in February 1982. He testified that the personnel manual reveals the policy after the clarification. The personnel manual provision which was received in evidence as General Counsel's Exhibit 22 reads as follows:

> "To avoid interruptions of work and complications or distractions in our operations, employees are not permitted to sell anything, distribute or post literature or other matter, make speeches or collections, or engage in any kind of solicitations during the time they are supposed to be working or any way interfere with the work of other employees".

Although Eure testified that the personnel manual solicitation rule quoted above reflected the change after the clarification, a comparison of the

personnel manual with the Notice to Employees, also quoted above, reveals that the significant clarifying sentence is not included, and thus, the rule in my view is ambiguous and invalid on its face under Board law. The omitted sentence reads, "These types of activities are only permitted during non-work periods such as lunch, rest periods, and before and after work".

Having found that the method employed by Respondent to effectuate a change in the rules, i.e., posting on plant bulletin boards rather than giving each employee a personal copy of the clarification for insertion in his copy of the handbook is not sufficient to comply with Board law, it is not necessary to resolve a credibility issue

involving testimony as to whether the notice of clarification was posted on the employee bulletin boards or whether the employees in fact saw them. In addition. the testimony reveals that Respondent's supervisors enforced the invalid rule during the time that Respondent claims the rule was validated by the posted clarification. (E.g., the discussion between Jerry Williams who at the time was handbilling on his day off and his supervisor who told him he could not handbill). I find that, in the circumstances, the Respondent has violated Section 8(a)(1) of the Act by maintaining an invalid no-solicitation rule contained in the employee handbook and the personnel manual and has violated Section 8(a)(1) of the Act in each

instance in which it attempted to enforce such a rule.

Other Alleged 8(a)(1) Activity

Kyle Wade Love, who has been in the employ of Respondent for two and a half years as a tow rail mechanic, testified that on September 14, his immediate supervisor Jim Tarver called Love into his office. Love said that Tarver explained why employee Leroy Mayberry had been fired because he had heard Love tell other employees that too many people had been fired for little or no reason. Tarver told Love that Mayberry was caught sleeping on the job and that somebody else in the warehouse had been caught sleeping and that they had to fire him because the company's back was up against the wall. Love testified that Tarver

then went on the subject of tow rail and conveyors and then talked about the Union. Love said that Tarver told him that the Union "would not help us if it got in there; that he'd worked at several other places that had had unions and he said that they had so many regulations and rules and stuff to go by that it made it hard to get all your work done and that a lot of people got fired because they weren't able to do it. He said that unions also caused businesses to go out of business. He said that by paying too high wages and too good benefits that the company couldn't afford it." He then mentioned International Harvester and Firestone as examples of companies going out of business because of too high wages. Tarver asked Love, "How come the people wanted a union?, and I told him

mainly because of the insurance benefits being cut".

Tarver in testifying on behalf of Respondent admitted that he had a conversation with Love concerning employees sleeping on the job, stating that he told Love, "We had fired other employees and what was fair for one employee was fair for all, and that we had fired Ricky Moore who was another one of my employees prior to -- sometime back." Tarver denied having any discussion with Love about the Union during that meeting. He said, however, that he had a conversation with Love prior to his going on vacation. He said Love approached him in his office and made a statement, "to the effect that he felt there was no job security, and due

to him bringing the conversation up, he said that he felt like that he would have job security with the Union. I had a question and answer sheet memorandum which dealt with security, one of the questions, and I asked him what made him feel that way. And that was the conversation that we had that brought up the Union."

Tarver said that he read out loud to Wade from a memorandum which contained the question, "Can the Union guarantee job security?" He continued, "The answer was 'No'. Look around at all the people from Firestone, John Morrell, International Harvester and others who are out of work. The Union couldn't guarantee job security there. Real job security only comes from a healthy

competitive productive company. At Baddour we are proud of the fact that no warehouse employees and very few others have ever been laid off. That's job security." Tarver said that they discussed tow rail carts during that conversation and the conversation was initiated by Love and that is how he initiated it with the subject of tow rails. Tarver admits that they discussed when he, Tarver, was a member of a union. Tarver then testified, "I told Wade that I once belonged to a union at my prior employer and Wade Love -- I explained to him the Union didn't seem to accomplish anything for me or the other employees that were members of the Union. We paid the dues to the Union and we didn't seem

to ever get any benefit from it.[18] I find the Respondent violated Section 8(a)(1) of the Act as alleged in the complaint.

Jerry Britton, who has been an employee of Respondent for 4 years as a stocker under the supervision of Don Parker, testified that in late August, Charles Smith, area supervisor, called him into his office. Smith asked Britton what he thought these people outside of the gate wanted from him and other employees. Britton told Smith that they

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[18]/ Tarver's testimony was given in a confused manner and his memory was not good. I credit Kyle Love and I do not credit Jim Tarver. Love's testimony was given in a clear, direct and detailed manner. Moreover, at the time he gave his testimony, Love was an employee of Respondent.

wanted to help the employees of Respondent. Smith told Britton that he didn't think so and that he thought they just wanted their money. Britton responded, "They can't get what we don't have." During that conversation Smith also asked Britton how his little girl was doing and at the end of the conversation Smith asked Britton if there was anything he could help him with or anything of that situation that he could help him with or to let him know.

Britton's testimony was not rebutted by the Respondent. Inasmuch as the employee in this case was called to supervisor Smith's office, which in itself has a coercive effect when interrogated about his feelings about the Union, I find that even though it appears

to be a friendly conversation, it is violative of Section 8(a)(1) of the Act. In addition, it appeared to be a solicitation of employee grievances when he asked him if there was anything he could help him with to let him know. TRW-United Greenfield Division, 245 NLRB 1135 (1979); Willow Corp., 244 NLRB 303 (1979).

Employee Jeffrey Pope, who was employed by Respondent from September 1, 1982 to October 6, 1982, as an order picker under the supervision of Hugh Allen, testified that in mid-September, Hugh Allen came to him and asked him how he felt about a union. Pope responded that he didn't know anything about a union. Allen asked if there was anything he needed to know. Pope stated, "Not

really". He then told Pope if he had any questions about a union, "don't hesitate to ask him or Mike Bond." Allen took him to Bond's office and Bond asked him how he liked his job and whether he was having any problems, and then asked him how he felt about the Union. Pope responded that he didn't know because he didn't have a union job. At that point Bond responded, "They didn't want a union because the union would be bad on the company and that if they could afford to give us a raise, they would. But due to inflation they couldn't." He said that the conversation took place in the presence of Allen, Bond and himself and lasted for about an hour.

Allen admits having had a conversation with Pope in mid-September

but stated that Pope initiated the conversation and that Pope asked him if he could vote in the election. Allen said he merely answered Pope's questions and told him that he would find out and that was the end of the conversation. Pope, on the other hand, testified that it was at a later date, after the two conversations with Allen, that he asked Allen if he would be eligible to vote in the election. Allen admits that he brought Pope to Bond's office and that Pope did not request the meeting and that both Allen and Bond were present in the office with Pope. Allen testified that Bond told Pope about the history of the company and later explained the cut backs that were taking place that might prompt union activity. Allen further testified that during that conversation Pope had

asked questions about the Union such as, "Why are they trying to get in?" Allen was not able to recall any other questions asked by Pope but specifically denied any questions asked by either Bond or himself about the Union. Bond admits the conversation took place but denies making any statements to Pope about how he felt about the Union. He said he only answered the questions Pope asked.[19] Bond testified that Pope was hired on September 1, 1982, and that the conversation he had with Pope was on

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19/ Hugh Allen was not a credible witness. He remembered specifically what was not said in the conversation but could not remember much about what was said in the conversations he had with Pope and Bond. He said that all the questions about the Union were asked by Jeff Pope and not by him or Bond. When asked what questions Pope asked, Allen replied, "I do not remember any specifics, they were just general questions".

September 20. He said when asked if he had a conversation with Pope concerning the Union, his response was, "I had a conversation with Jeffrey Pope on company history." He said the conversation stemmed, "from a question Jeff had approached Hugh Allen on. He came to Hugh Allen and asked him on the 20th, that morning was the 29th, if he would have a right to vote in the election. And at that particular time, no one knew, you know, who would have the right or who would not. And I was talking to Hugh and I told him, you know, Jeff had just started to work for us as an order picker trainee. He had no idea of company history, what the company had done in the past for the individuals and I told him, you know, that I could get together with Jeff and give him -- a list of company

history, things we had done in the past, why the benefits and things of this nature had been cut, were cut, and discuss the whole thing with him." He said the meeting lasted over an hour or an hour and fifteen minutes. When Bond was asked whether he ever asked Pope how he felt about the Union his response was, "definitely not".

I find it difficult to believe that Bond, long time supervisor of the company, and Allen, another supervisor, did not know whether employee Pope would be eligible to vote in the election. I also find it difficult to believe that they would have called Pope to Bond's office and lecture him for an hour and fifteen minutes about the history of the company if they did not in fact know

whether he was eligible to vote in the election. I believe they did know that he was eligible to vote and I also believe, as alleged in the complaint, that Bond asked Pope how he felt about the Union in addition to the other questions Pope said he asked, and I do not credit Bond or Allen based on my observations of them during their testimony and the convenient lack of memory of both Bond and Allen on specific points.[20]

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[20]/ By Motion dated July 1, 1983, the General Counsel moved to correct the official transcript. That Motion is granted. By letter dated July 1, 1983, Respondent submitted the following: Respondent's Motion to Strike Testimony and to Reject Evidence; Respondent's Motion to Reopen Record; and Respondent's Motion to Have Administrative Law Judge Withdraw from Cases. Those Motions are denied for lack of merit.

## The Effects of the Unfair Labor Practices Upon Commerce

The activities of the Respondent as set forth in Section III above occurring in connection with the operations of the Respondent, described in Section I above, have a close, intimate relationship to trade, traffic and commerce, among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## Conclusions of Law

1. Baddour, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Highway and Local Motor Freight Employees, Local 667, affiliated with International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. Baddour, Inc., has engaged in unfair labor practices in violation of Sections 8(a)(1), (3) and (4) of the Act, by discharging, demoting, warning, interrogating, and surveilling its employees.

The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Baddour, Inc., has engaged in and is engaging in certain unfair labor practices in violation of Sections 8(a)(1), (3) and (4) of the Act,

I shall recommend that it cease and desist therefrom and take certain affirmative action, including the posting of notices designed to effectuate the policies of the Act.

I shall recommend that it cease giving effect to or enforcing the unlawful no-solicitation/no-distribution rule discussed herein; cease its surveillance or giving the impression of surveillance of its employees' union activities; interrogating its employees with respect to their union activities; disciplining its employees, including, discharge warnings or demotions because they have engaged in union activity, or because they gave testimony before the Board.

I shall also recommend that Respondent be ordered to offer reinstatement to employees Larry Mayes, David Cordray, Patrick Amsden, Jerry Williams and Elton Hill, to their former or substantially equivalent positions and to make them whole for any loss of earnings they have suffered as a result of the discrimination practiced against them. Backpay provided herein with interest thereon is to be computed in the manner prescribed in F. W. Woolworth Company, 90 NLRB 289 (1950) and Florida Steel Corporation, 231 NLRB 651 (1977); the expunging from its records reference to the discharges, demotions and written warnings and to notify the discriminatees in writing that this has been done and that evidence of this unlawful conduct

will not be used as a basis for any future discipline against them.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[21]

ORDER

Respondent Baddour, Inc., its officers, agents, successors and assigns, shall:

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[21]/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Maintaining or giving effect to the invalid no-solicitation/no-distribution rule.

(b) Interrogating its employees concerning their protected concerted activities for their mutual aid and protection.

(c) Demoting, warning or otherwise disciplining employees because they have engaged in union activities or testified before the Board.

(d) Surveilling or creating the impression of surveillance of employees' union activities.

(e) Discharging employees because they have engaged in protected concerted activities with other employees for their mutual aid and protection.

(f) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Larry Mayes, David Cordray, Patrick Amsden, Jerry Williams and Elton Hill, immediate and full reinstatement to their former positions, or if such positions no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges and make them whole for any loss of earnings suffered by them as a result of their termination or demotion in the manner set forth herein entitled "The Remedy".

(b) Expunge from its records any reference to the discharges, demotions or warnings of its employees Larry Mayes, David Cordray, Patrick Amsden, Jerry Williams and Elton Hill, and notify them in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future discipline against them.

(c) Preserve and make available to the Board or any of its agents upon request, all records necessary to analyze the amount of backpay due under the terms hereof.

(d) Post at its offices and places of business in Memphis, Tennessee, copies of the attached notice marked "Appendix."[22]

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[22]/ In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE

Copies of said notices on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's authorized representatives, shall be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 26 in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. October 11, 1983.

George Norman
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

After a trial in which all parties have a chance to give evidence, it has been found that we, BADDOUR, INC., have violated the National Labor Relations Act, as amended, and we have been ordered to post and to abide by the following:

WE WILL NOT terminate, demote, give warnings to, refuse to reinstaten or otherwise discriminate against our employees because of their membership in or because they engage in activities on

behalf of the Union or gave testimony before the Board.

WE WILL NOT engage in surveillance or give the impression of surveillance of our employees' union activities.

WE WILL NOT question our employees concerning their union activities, including attendance at union meetings.

WE WILL NOT question employees concerning their sympathy for, and activities on behalf of, Highway and Local Motor Freight Employees, Local 667, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT give any force or effect to the no-solicitation/no-distribution rule printed in our employee handbook and employee manual.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to LARRY MAYES, DAVID CORDRAY, PATRICK AMSDEN, JERRY WILLIAMS and ELTON HILL, to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges and WE WILL make them whole with interest for any loss of earnings suffered as a result of

their being discriminatorily terminated or demoted.

BADDOUR, INC.
(Employer)

Dated --- By----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Mid-Memphis Tower Building, Suite 800,

D-173

1407 Union Avenue, P.O. Box 41559, Memphis, Tennessee 38104, Telephone 901-521-2687.

D-174

JD-408-83

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

BADDOUR, INC.

Respondent

and

HIGHWAY AND LOCAL MOTOR FREIGHT EMPLOYEES, LOCAL 667, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA — Cases 26-CA-9846, 26-CA-9957, 26-CA-6527

Charging Party

and

ELTON HILL, an Individual — Case 26-CA-9997

Charging Party

and

JERRY LEONARD WILLIAMS, an Individual — Case 26-CA-10121

Charging Party

ERRATUM

On October 11, 1983, a Decision was issued in the above-captioned case. However, through inadvertent error, a disposition of the objections in Case No. 26-RC-6597 was not included. The Order in that case is hereby amended to add the following:

"3. Having found that the objections filed by the Union following the October 29, 1982, election to be meritorious inasmuch as those objections were made allegations in the consolidated complaint, that election is set aside and a second election by secret ballot shall be conducted among the employees in the unit found appropriate by the Regional Director and found appropriate herein, at such time as the Regional Director for Region 26 deems appropriate. The

Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off".

Dated, Washington, D.C. October 25, 1983.

George Norman
Administrative Law Judge

# APPENDIX "E"

## RELEVANT TEXT OF STATUTES CITED

1. Section 8(a), National Labor Relations Act, 29 U.S.C. §158(a)

a. It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

2. Section 10(e), National Labor Relations Act, 29 U.S.C. §160(e)

e. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

3. Judicial Code and Judiciary, 28 U.S.C. §144

Bias or prejudice of judge. Whenever a party to any

proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

4. National Labor Relations Board's Rules and Regulations, Series 8, as amended

Sec. 102.37 Disqualification of administrative law judges.

- An administrative law judge may withdraw from a proceeding whenever he deems himself disqualified. Any party may request the administrative law judge, at any time following his designation and before filing of his decision, to withdraw on grounds of personal bias or disqualification, by filing with him promptly upon the discovery of the alleged facts a timely affidavit setting forth in detail the matters alleged to constitute grounds for disqualification. If, in the opinion of the administrative law judge, such affidavit is filed with

due diligence and is sufficient on its face, he shall forthwith disqualify himself and withdraw from the proceeding. If the administrative law judge does not disqualify himself and withdraw from the proceeding, he shall so rule upon the record, stating the grounds for his ruling, and proceed with the hearing, or, if the hearing has closed, he shall proceed with issuance of his decision, and the provisions of section 102.26, with respect to review of rulings of administrative law judges, shall thereupon apply.

Sec. 102.64 Conduct of Hearing. - (a) Hearing shall be conducted by a hearing officer and shall be open to the public unless otherwise ordered by the hearing officer. At any time a hearing officer may be substituted for the hearing officer previously presiding. It shall be the duty of the hearing officer to inquire fully into all matters in issue and necessary to obtain a full and complete record upon which the Board or the Regional Director may discharge their duties under Section 9(c) of the Act.